1996

State of Utah v. Raymond Perez : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	Case No. 960375-CA
	:	
v.	:	
	:	Priority No. 2
RAYMOND PEREZ,	:	
	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

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APPEAL FROM CONVICTIONS OF DISTRIBUTION OF A CONTROLLED SUBSTANCE WITHIN 1000 FEET OF A CHURCH, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(a)(ii) (1995), AND DISTRIBUTION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(a)(ii) (1995), IN THE SECOND DISTRICT COURT IN AND FOR WEBER COUNTY, THE HONORABLE MICHAEL J. GLASSMAN, PRESIDING.

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

This appeal arises from convictions for distribution of a controlled substances within 100 feet of a church, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (1995), and distribution of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (1995). This Court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF THE ISSUES ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. Did the trial court commit plain error in allowing the State or any of the State's witnesses to comment on the confidential informant's credibility in the face of defendant's failure to object? As a general rule, appellate courts will not consider an issue raised for the first time on appeal, unless the trial court committed plain error or the case involves

exceptional circumstances. See, e.g., State v. Cook, 881 P.2d 913, 914 (Utah App. 1994); State v. Brown, 856 P.2d 358, 359 (Utah App. 1993). Because defendant failed to object, the issues of error, obviousness of error, and prejudice, see State v. Dunn, 850 P.2d 1201, 1208-09 (Utah 1993), are matters of law for this Court to decide.

2. Was defendant denied effective assistance of counsel when his trial counsel failed to object to the prosecutor's remarks in opening statement, or any of the State's witnesses' comments, regarding the confidential informant's supplying "good information" in prior drug cases? "When . . . the claim of ineffective assistance of counsel is raised for the first time on appeal, [the appellate court] resolve[s] the issue as a matter of law." State v. Strain, 885 P.2d 810, 814 (Utah 1994). In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish (1) that his counsel's performance "fell below an objective standard of reasonableness;" and (2) that counsel's performance prejudiced the defendant. Id. at (citing Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064 (1984)).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Rule 608 of the Utah Rules of Evidence provides:

(a) **Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

STATEMENT OF THE CASE

Defendant was charged by information with distribution of a controlled substance within 1000 feet of a church, a second degree felony (Count I), and with distribution of a controlled substance, a third degree felony (Count II) (R. 1-2). A jury found defendant guilty of both counts (R. 76-77). The trial court sentenced defendant to concurrent prison terms of one-to-fifteen years and zero-to-five years (R. 81).

STATEMENT OF FACTS

In January 1995, after Adam Black had left prison and was on parole, he began giving his parole officer information about other parolees who were violating their parole and committing crimes (R. 190, 192). After Black's information lead to several arrests, the Weber-Morgan Narcotics Strike Force began using him as an confidential informant (R. 192-93, 198). After his release

from prison, Black become reacquainted with defendant, whom he recognized from the Utah State Prison (R. 330-31, 390-91, 397). Black would see defendant daily at the Red Duck, a convenience store where Black worked and where defendant frequently shopped (R. 337, 541). Black and defendant became friends and Black visited defendant's apartment on several occasions (R. 350, 401-02, 542, 562).

After defendant offered to sell Black drugs, Black informed his parole officer, Blake Woodring (R. 196, 340). Woodring contacted the Weber-Morgan Strike Force and arranged to use Black as a confidential informant to purchase narcotics from defendant (R. 193, 477).

On October 26, 1995, Black, fitted with a wire transmitter, attempted to purchase narcotics from defendant. However, defendant declined to make a sale on that occasion because officers were executing a search warrant for drugs at a house across the street (R. 345, 349, 399, 488). Defendant told Black there was "too much heat" and to come back later (R. 349, 489).[1]

On October 30, 1995, a controlled buy was arranged and

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[1] Officer Lyle Bayless monitored the conversation between defendant and Black on October 26, 1995 (R. 487-89). Although he did not then know defendant, the voice he heard was similar to defendant's (R. 489).

completed between Black and defendant at defendant's apartment (R. 350). Before heading up to defendant's apartment, Black stopped to tell some individuals in the parking lot that he was going to buy some marijuana from defendant (R. 360). An unidentified male answered when Black knocked on defendant's door. Black asked for defendant and was invited into defendant's apartment (R. 299). Black had a brief conversation with this man about buying some stolen stereos (R. 362). After a couple of minutes, defendant appeared and Black asked him if he had his "stuff" (R. 300). Defendant responded that he did and then left to retrieve two bags of marijuana (R. 300, 363-64). Black briefly squabbled with defendant about the marijuana not amounting to an ounce (R. 364). Once satisfied there was indeed an ounce divided between the two bags, Black handed defendant $250 for the drugs (R. 364). When asked by Black if he could get more drugs "real quick," defendant said "yes" (R. 365). Officers Laplant and Elliott, who had earlier fitted defendant with a wire transmitter and watched him approach defendant's apartment, monitored this conversation (R. 260-65, 295-300). The distance from defendant's apartment and the First Baptist Church was later measured and determined to be to 472 feet (R. 461).

On November 13, 1995, a second controlled exchange between

Black and defendant took place (R. 368). Black called Agent Bayless that afternoon and told him he had arranged a buy at the Red Duck with defendant (R. 369, 493). However, when Bayless came into the store, at just about the time the buy was supposed to take place, defendant, who had been standing around outside, came into the store too (R. 305, 371, 494). Black pretended that Bayless was an electrician who was there to fix some lights so that Bayless could search Black and wire him in the back room (R. 372, 494-96).

After both Bayless and a customer left, defendant came up to Black and said: "I got it." (R. 377, 502). Black confirmed that defendant had an ounce of marijuana and a quarter gram of cocaine (R. 213, 307, 377, 502). Defendant then handed a sock to Black which defendant said contained the drugs (R. 378). Black did not look into the sock at that time but felt something resembling a bag of marijuana inside (R. 378-79). Black paid defendant $250 or $260 for the narcotics (R. 378, 432-33). Defendant left the store and went up the hill to his apartment (R. 308, 502).

After defendant left, Black looked into the sock and found the cocaine was missing (R. 310, 381). He told one of the people hanging around outside the store to go get defendant (R. 216, 311, 383, 505). Defendant came in and insisted he put the

cocaine on the counter, but they could not find it (R. 219-20, 312, 385, 507). Defendant promised to "take care of him" (R. 313, 326, 385), and in fact, brought Black a quarter gram of cocaine the following Saturday (R. 222, 387).

Officers Bayless, Laplant, and Woodring listened to the entire transaction between defendant and Black (R. 206-07, 500, 502, 524). In addition, all three of the officers could view the store from their vantage points (R. 206-07, 502, 522).

Prior to each buy, Black was searched to ensure he did not have any drugs in his possession and all of his money was taken (R. 87, 256, 292-93, 358, 487, 496). Following the second buy, Black was also given a surprise urine analysis test to ensure he was not using drugs (R. 222, 509). The results were negative (R. 222, 509).

Defendant testified that although he knew Black, he did not sell any drugs to Black on either occasion (R. 545, 553-55).

SUMMARY OF ARGUMENT

POINT I

There was no plain error in the trial court's allowing the prosecutor to comment on the confidential informant's credibility in opening statement or to elicit testimony supporting the informant's credibility on direct examination.

The prosecutor is permitted to present to the jury in opening argument an unargumentative overview of the evidence, which the prosecutor did by accurately referencing testimony elicited in direct examination. That testimony was properly elicited because defendant attacked the informant's credibility in his opening statement, a circumstance placing this case outside the prohibitions of rule 608(a)(2), Utah Rules of Evidence, and distinguishing it case from State v. Hovater, 914 P.2d 37 (Utah 1996), upon which defendant relies exclusively.

Even if the prosecutor's comment's in opening statement amounted to bolstering, such commentary was not improper in the circumstances of this case, based on the majority view in the federal circuits applying rule 608(a)(2) of the Federal Rules of Evidence. Specifically, the prosecutor's remarks in opening statement simply anticipated an inevitable attack on the informant's credibility, an event fully realized in defendant's opening and closing statements and through cross examination.

Because Hovater is not expressly on point and because the opinion was only issued five days prior to trial in this case, any error in the trial court's failing to follow it in this case could not have been obvious. In any case, because of the compelling evidence of defendant's guilt independent of the

informant's testimony, any error was harmless.

POINT II

Defendant has failed to demonstrate that his counsel was ineffective. Because there was no error in the trial court's allowing the prosecutor to comment or witnesses to testify about the confidential informant's credibility, any objection would likely have been denied. Thus, defense counsel's failure to object cannot be considered deficient performance. Additionally, because there was compelling evidence of defendant's guilt independent of the informant's testimony, defendant was not prejudiced by his counsel's failure to object to the prosecutor's remarks or the witnesses' testimony.

ARGUMENT

POINT I

DEFENDANT HAS FAILED TO DEMONSTRATE PLAIN ERROR. NOT ONLY DID THE STATE NOT IMPROPERLY BOLSTER THE CREDIBILITY OF ITS CONFIDENTIAL INFORMANT IN EITHER OPENING ARGUMENT OR DURING THE TESTIMONY OF ITS FIRST WITNESSES, BUT ALSO ANY ERROR WAS NEITHER OBVIOUS NOR PREJUDICIAL.

At trial, defendant failed to object to the prosecutor's supporting the credibility of the State's confidential informant. On appeal, defendant now argues that, in violation of rule 608(a)(2), Utah Rules of Evidence and State v. Hovater, 914 P.2d

37 (Utah 1996), the trial court committed plain error in allowing the prosecutor to improperly bolster Adam Black's credibility in its opening statement and during direct testimony of its initial witnesses. Appellant's Br. at 8-14. The argument is without merit.

In order to establish plain error and to obtain appellate relief from an alleged error that was not properly objected to, "the appellant must show the following: (i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant." State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993) (citations omitted). If defendant fails to prove any one of these requirements, plain error is not established. Id. at 1209 (citations omitted).

A. The Prosecutor did not Improperly Bolster.

Defendant argues that the State immediately starting bolstering Black's credibility in its opening statement, in violation of Rule 608(a)(2)[2] and Hovater. Appellant's Br. at 9-

[2] Rule 608 provides, in pertinent part: "[E]vidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked has been attacked by opinion evidence or otherwise." Utah R. Evid. 608(a)(2).

11. Defendant, however, misapprehends the appropriate reach of opening argument. In its opening statement, the State did not improperly bolster Black's character for truthfulness but merely provided the jury with an overview of the facts the State intended to prove during its case-in-chief.

In an opening statement, a party should "give the jury an unargumentative overview of the facts the party intends to prove." State v. Lafferty, 749 P.2d 1239, 1254 (Utah 1988) (citing State v. Williams, 656 P.2d 450, 452 (Utah 1982)), cert. denied, Cook v. Lafferty, 504 U.S. 911, 112 S.Ct. 1942 (1992); Rank v. State, 883 S.W.2d 843, 845 (Ark. 1994) (because evidence gave way to inference that the defendant's statement was false, prosecutor was entitled to refer to it during opening statement). This is precisely what the prosecutor did when he explained that Black had given officers good information on a number of occasions which had eventually lead to arrests (See R. 163-65 for pertinent portion of opening statement; attached at Appendix A). Indeed, this information was later proven through the testimony of Officers Woodring and Laplant during the State's case without challenge to its accuracy (R. 190-92, Appendix B; 314-315,

Appendix C, respectively).[3]

Thus, the central question is whether the prosecutor's remarks properly referenced properly admitted evidence. Defendant relies exclusively on Hovater in support of his claims that the prosecutor improperly bolstered Black's character for truthfulness in both opening argument and in direct examination.

In Hovater, a police officer used an informant to purchase drugs from Hovater. Hovater, 914 P.2d at 38-39. On direct examination the officer testified that the informant had assisted him on a number of buys, seven of which had resulted in guilty pleas without any suggestion that the informant had planted drugs on those convicted. Id. at 40. Hovater's trial attorney did not object to the examination, but on appeal Hovater's counsel argued ineffective assistance of trial counsel. Id. at 41. Specifically, Hovater claimed that the prosecutor had improperly

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[3] Compare Williams, wherein the court also stated: "It is not proper to engage in anticipatory rebuttal or to argue credibility by referring to impeachment evidence the other side may adduce." Williams, 656 P.2d at 452. In Williams, the prosecutor commented in opening argument that the defendant's companion during the offense had been coerced into signing statements stating that the defendant was not involved in the robbery. Id. at 452. The prosecutor's remarks about the statements were apparently offered to blunt the anticipated impeachment of defendant's companion. Id. In contradistinction to this case, however, the neither the State nor the defendant actually put in evidence the challenged written statements. Id.

bolstered the informant's credibility *before* his character for truthfulness had been impugned, in violation of rule 608(a)(2). Id. The State responded that Hovater had attacked the informant's credibility in opening argument. Id.

In reversing Hovater's conviction, the Utah Supreme Court first recognized that "a number of jurisdictions with similarly worded rules have held that bolstering evidence is admissible following an attorney's disparagement of a witness's credibility during the attorney's opening argument," citing cases from federal[4] and state jurisdictions. Hovater, 914 P.2d at 41.[5] The court found that Hovater's opening statement did not attack the informant's credibility for truthfulness. However, without disapproving of the authority it had previously cited, the court chose not to decide whether the Utah rule should be construed consistent with that authority. Rather, the court held that the

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[4] Rule 608(a), Utah Rules of Evidence, is the federal rule verbatim. Utah R. Evid. 608 advisory committee note.

[5] See id. at 41 (citing United States v. Cruz, 805 F.2d 1464, 1480 (11th Cir. 1986); United States v. Jones, 763 F.2d 518, 522 (2d Cir. 1985); State v. Van Der Heyden, 615 A.2d 1246, 1249 (N.H. 1992); People v. Cherry, 554 N.Y.S.2d 884, 885 (1990)).

prosecutor had violated rule 608(b), by bolstering[6] the informant's credibility on direct examination with specific instances of conduct. Id. at 41-42. However, the court ultimately held that the error was harmless because there was sufficient evidence to convict Hovater entirely apart from the informant's testimony. Id. at 43.

Contrary to defendant's assertion, Hovater is not apposite to this case. First, defendant's claim of error in this case is based exclusively on rule 608(a)(2). However, Hovater's discussion of rule 608(a) is only dictum, since that case was decided exclusively on the authority of rule 608(b). Therefore, the court's determination of error does not apply to this case.

However, even if dictum in Hovater, permitting bolstering following attack in opening argument, were the rule of law, the facts in Hovater would not lead to the same conclusion in this case. In Hovater, the court concluded that bolstering the informant would be improper because he was not first attacked in Hovater's opening argument. In this case, bolstering of Black's

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[6] The court merely assumed that the officer's testimony constituted "bolstering," without analysis. Id. at 43. The State concedes that testimony elicited from Officers Woodring and Laplant on direct examination about Black's useful information, and the prosecutor's brief synopsis of such testimony in opening, was substantially the same as the officer's in Hovater.

character for truthfulness at this point was permissible since the resuscitating provision of Rule 608 had been triggered during defendant's opening argument. Rule 608 permits the introduction of truthful character once the character of the witness for truthfulness has been attacked. In his opening statement, defense counsel repeatedly made personal attacks on Black's credibility (See R. 179-85 for pertinent portion of opening statement; attached at Appendix D). He stated:

> Who do you want to believe, the confidential informant ... who has been in prison? (R. 180).
>
> [W]hat he is getting in return is getting restitution paid off, is getting off parole, those types of things are things in return. ... Those are reasons why this confidential informant, who hasn't had an honest background, would have possibly to say and do these things, because of the convenience that presented itself (R. 181-82).
>
> So again, it comes down to whether this confidential informant is actually telling the truth. ... What if he was in there and was to get the drugs from someone else and come out and say he got them from Mr. Perez or another individual? (R. 182).
>
> So again we are left to listen to Mr. -- to the confidential informant and trust what he says. And is he someone that we want to trust, and want to believe beyond a reasonable doubt that this is the way it happened? (R. 184).

These statements were sufficient to trigger rule 608 and

allow the State to resuscitate Black's credibility.[7] Therefore, it would not have been error to allow Blake Woodring or Rodney Laplant to testify as to defendant's character for truthfulness, although neither in fact did.

Finally, defendant notes that the Hovater court warned this prosecutor that bolstering by use of specific instances of conduct of a witness may not be proven by extrinsic evidence. Appellant's Br. at 10. However, this Court should not consider on appeal whether the State improperly offered extrinsic evidence to support Black's credibility in violation of rule 608(b) because defendant has not properly raised that issue. Defendant makes a passing reference to this portion of the court's holding in Hovater and does not specifically allege anywhere in his brief that the State improperly elicited extrinsic evidence about specific instances of Black's conduct. See State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984) (refusing to consider issue when no legal analysis has been made); State v. Yates, 834 P.2d 599, 602

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[7] Cf. e.g., Cruz, 805 F.2d at 1480 (allowing prosecutor to bolster witnesses' credibility after defense counsel, during opening argument, asserted government's witnesses could not be trusted); Jones, 763 F.2d at 522 (allowing prosecutor to rehabilitate witnesses on direct examination after defense counsel, in opening statement, accused one witness of previously committing perjury and questioned whether government witnesses had simply "made a deal to save their own hide").

(Utah App. 1992) ("This court has routinely declined to consider arguments which are not adequately briefed on appeal."). This issue is therefore not properly before this Court.

Even if the prosecutor's remarks in opening argument and Officers Woodring's and Laplant's testimony about Black's "good information" constituted "bolstering," those references were proper in the context of all the circumstances. Even though the question has not been decided in Utah, see Hovater, 914 P.2d at 41, where the bolstering material also contains the basis for the opposing party's impeachment, admission of the evidence has generally been upheld. See United States v. Lord, 907 F.2d 1028, 1029-31 (10th Cir. 1990) (refusing to find plain error and following "the majority of circuits [which] allow the government to admit evidence of the truthfulness provisions of an agreement on direct examination of a witness, prior to any challenge to the witness's credibility," under rule 608(a)(2) because "evidence concerning a plea agreement and its provisions may have both a bolstering and an impeaching effect on the witness's credibility); United States v. Oxman, 740 F.2d 1298, 1302-03 (3d Cir. 1984) (upholding claimed instances of vouching on direct examination since the government could reasonably anticipate impeachment), vacated on other grounds, 473 U.S. 922, 105 S.Ct.

3550 (1985); United States v. Townsend, 796 F.2d 158, 162-63 (6th Cir. 1986) (no error in introducing cooperating witness's entire plea agreement, containing promises to testify truthfully, upon which the witness's credibility could both be bolstered and impeached). See also United States v. Kramer, 711 F.2d 789, 795 (7th Cir. 1983) (not improper for the prosecutor to discuss during opening and closing arguments conditions that support the credibility of its witnesses).[8]

The holdings in these cases are based on the policy of rule 608(a)(2). In United States v. Bowie, the court noted: "Fed. R. Evid. 608(a)(2) seems primarily concerned with saving time and simplifying trials; unless there is a specfic reason to believe otherwise, we can safely presume that witnesses tell the truth." United States v. Bowie, 892 F.2d 1494, 1499 (10th Cir. 1990) (emphasis added). However, where it is apparent that the witness's credibility will be challenged, time is not wasted, nor

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[8] Alternatively, at least one court has found, without independent consideration of the evidence supporting guilt, that although the government's introduction of a cooperation agreement on direct examination of its principal witness was error, the error was harmless because of the inevitability of an attack on the witness's credibility based on his obvious motivation to lie, a point which was brought to the jury's attention in the defendant's opening and closing statements and through vigorous cross examination. See United States v. Arroyo-Angulo, 580 F.2d 1137, 1146-47 (2d Cir. 1978).

is the trial complicated by allowing the prosecutor to preemptively comment on the witness's credibility.

In this case the basis for impeachment was explicit in the prosecutor's and witnesses' references to Black, and defendant's anticipated impeachment of Black was obvious. The prosecutor stated that Black had been in prison, that he was on parole during the events at issue, and that he accepted police payment for his remaining restitution and for relocation, all prime bases for impeachment (R. 163-66). Defendant amply exploited every opportunity to impeach Black's credibility on each of these points in opening statement (R. 180-85), in cross examining Officer Woodring and Black himself (R. 224-227, 390-97), in his own testimony (R. 538-40), and in his closing argument (R. 598-601). Indeed, as the prosecutor noted, the entire defense was based on the theory that Black "set [defendant] up" (R. 617), and accordingly, defendant thoroughly attacked Black's credibility. In these circumstances, it was not error either to allow the prosecutor to modestly comment on Black's credibility in opening statement or admit the officers' testimony about Black's "good information".[9]

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[9] Compare Williams, where, in contradistinction to this case, the supreme court found objectionable the prosecutor's

In sum, the prosecutor did not improperly bolster Black's character for truthfulness during opening argument, but merely provided the jury with an overview of the testimony properly elicited from Officers Woodring and Laplant. Further, that testimony was elicited after defendant undeniably attacked Black's character for truthfulness in opening argument, in circumstances where impeachment could reasonably be anticipated based on Black's background and acceptance of benefits in exchange for information. Thus, there was no error in the trial court's allowing the prosecutor's comments in opening argument or the officers' testimony regarding the accuracy of Black's information.

B. Even If there was Error, it was not Obvious.

Defendant also claims that the alleged errors should have been obvious to the trial court because the prosecutor's comments during opening statement "were clearly intended to prove that Adam Black was a truthful person." Appellant's Br. at 11. Defendant also argues that the trial court should have been particularly aware that these statements were impermissible since

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anticipatory rebuttal of defense evidence which the defense never introduced or relied on in impeaching the witness's testimony. Williams, 656 P.2d at 452.

it had been "warned by the Supreme Court in Hovater only five days earlier." Id.

However, the short period of time that elapsed between the release of the Hovater slip opinion and the start of defendant's trial does not make the alleged error more obvious but in fact tends to mitigate against a finding of obviousness. The Hovater decision was released a mere five days before the start of defendant's trial and its holding was dealt only with the admissibility of specific instances of conduct under Rule 608(b), not at issue here.[10] Thus, if the prosecutor did improperly bolster Black's credibility, the error cannot be regarded as sufficiently obvious so as to trigger application of the plain error rule.

C. Because Evidence of Defendant's Guilt was Compelling Even Without the Confidential Informant's Testimony, Any Error in Bolstering was, at Most, Harmless.

Finally, defendant asserts the prosecutor's alleged errors were "extremely prejudicial" to defendant and "cannot be said to have been harmless." Appellant's Br. at 13-14. He specifically

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[10] Defendant also claims the alleged error should have been obvious to Mr. Daines who was the prosecutor in Hovater. Appellant's Br. at 11. Yet, the relevant test is whether the error was obvious *to the trial court*. See Dunn, 850 P.2d at 1208. It is thus irrelevant whether the prosecutor was aware of any error.

claims that the prosecutor's statements "gave undue weight" to Black's testimony, and without that information, "the jury was left only with the word of an ex-convict." Appellant's Br. at 18. Defendant further suggests there was "a lack of corroborating evidence on at least one of the convictions." Id.

Not only has defendant failed to show that, absent this alleged error, there was a reasonable likelihood of a more favorable outcome, but his claims that Black's testimony was uncorroborated are wholly unsupported by the record. The record reveals the case against defendant was based upon the testimony of Black as well as Officers Woodring, Elliott, Laplant, and Bayless, all of whom corroborated Black's testimony. Even without Black's testimony, the jury had compelling evidence to convict defendant on the basis of the officers' testimony along with expert testimony from Arthur Terkelson that the substances received from defendant were marijuana. See Hovater, 914 P.2d at 43 (finding jury had enough evidence to convict defendant without the confidential informant's testimony).

Agent Laplant, who was positioned at a different location, was able to hear most of the conversation between defendant and Black (R. 294). Agent Laplant, Blake Woodring's partner, had done several curfew checks on defendant with Woodring and had

also talked to defendant a couple of times at the Adult Probation & Parole Office (R. 290). Agent Laplant had no trouble recognizing defendant's voice over the transmitter (R. 299). Laplant heard Black ask defendant if he had "his stuff," and defendant responded that he did (R. 300). There was "no question whatsoever" in Officer Laplant's mind that it was defendant's voice he heard (R. 300); he was "a hundred percent sure" (R. 322).

Officer Bayless, Black's controlling agent on the Strike Force, testified about the second buy that was arranged between Black and defendant on November 13, 1995 (R. 493). From where he was positioned in the alley, Officer Bayless could see defendant in the store (R. 522). He also heard the conversation between Black and defendant on a receiver in his truck (R. 502). He noted the person speaking to Black was the same person that he had just seen speaking to Black in the store (R. 502), and the same person Black had identified as Raymond Perez, the defendant (R. 494). There was no question in Bayless's mind it was the same voice (R. 502).[11] He heard Black ask defendant if he had

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[11] After the buy, when Black discovered that the cocaine was missing and defendant came back down to the store to look for the missing crank, Bayless heard defendant's voice again (R. 507). Again, he was sure it was the same voice (R. 507).

"the stuff"; defendant said "yeah"; Black asked if it was an ounce of marijuana and a quarter gram of crank, and defendant said it was (R. 502). Bayless then visually observed defendant leave the store (R. 502).

Agent Laplant was also involved with the second buy at the Red Duck (R. 304). Agent Laplant easily identified defendant when he entered the store just prior to the transaction (R. 305, 323). Laplant also distinctly heard the conversation between Black and defendant (R. 317). He heard Black ask defendant if he had "the stuff," and defendant said he had an ounce of marijuana and a gram of coke (R. 307). Laplant recognized the defendant's voice and noted it was the same voice he had heard on October 30, 1995 during the first buy (R. 307).

Finally, Agent Woodring corroborated Black's testimony. Woodring was defendant's parole officer and accordingly, knew defendant well and could easily recognize his voice (R. 194-96). Agents Woodring and Laplant observed the second transaction from outside the Red Duck and listened to defendant's conversation with Black over the wire attached to Black (R. 206-07). Woodring was certain he heard defendant's voice on the bug (R. 212). He heard defendant say he had "the stuff," which was a quarter gram of cocaine and an ounce of marijuana (R. 213). There was no

question in Woodring's mind it was defendant's voice he heard (R. 213, 220, 239, 246). In addition, Woodring got a full view of defendant and positively identified him (R. 213). He was "one hundred percent sure" it was defendant he saw exit the store following the buy (R. 246).

In sum, there was compelling evidence for the jury to find defendant guilty absent any alleged error. Black's testimony was corroborated by four other officers, all of whom were involved in at least one of the transactions. Defendant has not made the requisite showing of prejudice and thus cannot prevail on his plain error claim. See Dunn, 850 P.2d at 1209 ("If any one of these requirements is not met, plain error is not established.").

POINT II

DEFENDANT FAILS TO DEMONSTRATE INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also claims he was denied his Sixth Amendment right to effective assistance of counsel because his trial counsel's failure to object to "the blatant bolstering of the confidential informant's truthfulness" prejudiced him. Appellant's Br. at 15-18.

In State v. Templin, 805 P.2d 182 (Utah 1990), the Utah Supreme Court adopted the two-part test set out in Strickland v.

Washington 466 U.S. 668, 104 S. Ct. 2052 (1984), in evaluating a claim of ineffective assistance of counsel. The defendant must first "identify the acts or omissions" which, under the circumstances, "show that counsel's representation fell below an objective standard of reasonableness." Id. at 186. This requires a showing that counsel's errors were so serious that he was not functioning as "counsel" as guaranteed by the Sixth Amendment. Id. Secondly, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. 186-87. The defendant has the burden of proof with respect to both prongs of the Strickland test. Id. at 186. Defendant has failed to carry the burden with respect to both of these parts.

As demonstrated above in the plain error analysis, defendant cannot establish prejudice under the second prong of the Strickland test. See Strickland, 466 U.S. at 687, 104 S. Ct. at 2064 (1984). Defendant has not shown there was a reasonable likelihood of a more favorable verdict absent his trial counsel's failure to object to the State's alleged bolstering, and the record contains compelling evidence of defendant's guilt. Nor

can defendant meet the first part of the Strickland test, since his trial counsel's performance did not fall below an objective standard of reasonableness. See 466 U.S. at 687-88, 104 S. Ct. at 2064. Had defendant's trial counsel objected to the State's alleged bolstering, such an objection, as discussed in Point I(A) of this brief, would likely have been overruled. "[T]he failure of counsel to make motions or objections which would be futile if raised does not constitute ineffective assistance." Codianna v. Morris, 660 P.2d 1101, 1109 (Utah 1983) (quoting State v. Malmrose, 649 P.2d 56, 58 (Utah 1982)). Certainly, the question of whether an objection was proper here is sufficiently close that failing to object or simply choosing not to object does not fall below "an objective standard of reasonable professional judgment." State v. Germonto, 868 P.2d 50, 61 (Utah 1993).

CONCLUSION

Based on the foregoing, the State requests that this Court find defendant's claims without merit and affirm his convictions.

RESPECTFULLY SUBMITTED this 25th day of April, 1997.

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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed first-class, postage prepaid, to Kent E. Snider, Weber County Public Defenders Assoc., attorneys for defendant, 2564 Washington Blvd., Ogden, Utah 84401, this 25 day of April, 1997.

Kenneth A. Bronston

ADDENDA

ADDENDUM A

be unusual for me or my witnesses to run into one of you. If we appear to be avoiding you like the plague, that's because we are supposed to be doing that. That has nothing to do with what we think about you. And during the course of the proceedings here there will be times that we will take breaks during the middle of the day. There is only one door in and out of here, so please just look upon it that way, and we will try to move through it as quickly as we can so we will get you out as quickly as we can.

In January of 1995 a young man by the name of Adam Black, who was the undercover agent in this case, was on parole out of the Utah State Prison to a parole officer by the name of Blake Woodring who works here in Ogden right across the street in the State Building for the Adult Parole and Probation department. He went to him and he said, look, I am out on parole. I am working up the street at the Red Duck. The Red Duck, for those of you who may not know where this particular Red Duck is, is on the corner of Adams and 26th Street. It kind of sits on the hill. It isn't on the street. And it sits kitty-cornered to the edge of Adams and 26th Street.

He said I am up in this store. A lot of people are beginning to approach me and doing various things and offering to sell me stolen property, offering to sell me drugs. And by the way, there is some guy up there running around right now who I think is trying to palm forged checks off on me.

Blake Woodring asked him about the last of the matters, who is this guy? Can you help us with him? With no agreement for him to be an undercover gent or anything, he simply gave the parole department the information about this person from Oregon who was passing bad checks. As it turns out, he is a person who was wanted in three different states, and has been convicted of 11 separate counts of forgery in three different states. And ended up getting Blake Woodring a medal from the Department of Corrections over his assistance in catching this guy. That's how the Parole Department found out about him.

And then subsequently, or after that, the Weber-Morgan Narcotics Strike force became acquainted with Adam Black's ability as an undercover agent. Adam Black has been in prison. He was in prison with this Defendant. And that's how he knows this Defendant. It happens that this Defendant was living in an apartment right next door to the Red Duck when Adam Black was working there. That's how this case arises.

But before the case arose, Adam, who happens to come from a little bit different background than some of the street kids, he comes from a very wealthy family. Although he gets none of the money himself, his father is extremely wealthy in the State of Texas. And that was known when he was in prison. So if you are wondering why would all of these people come to Adam Black, he has the reputation of at least coming from a family with a lot of money, although Adam doesn't get any of

it.

And he was in prison. When he came out of prison, he began seeing people with whom he had been in prison. And he started dropping by Blake Woodring's office and giving him information. You cannot use a parolee as an undercover agent just on the decision of a parole agent. It is prohibited by the Corrections Department. But because of all of the information that Adam Black kept giving the Parole Department, and because of the fact that all of this information was turning out to be good information, Blake Woodring applied to the administrative offices in Salt Lake to permit Adam Black to work undercover.

Now Adam Black requested absolutely nothing of the Parole Department to this point, to the point that he had been giving all of this information, including the guy from Oregon, had asked for absolutely nothing. Blake Woodring said to Adam, I am going to apply to let you be an undercover agent because of all of the information that you seem to be able to get. And all of the information that you may be able to get in the future. But you will not do this for nothing. We don't have agents work for nothing. So if you go to work as an undercover agent for us, we will pay off. And this is basically the agreement they have with him, $195.00 in restitution that he still owed on the burglary that he had gone to prison on. Plus he will get money for gas, because

ADDENDUM B

A Mr. Black has never had a positive urine sample.

Q All right. Now in January of 1995--I assume that your relationship with Mr. Black between October of '94 and January of '95 was the standard parole officer?

A He was on I.S.P. which is intensive supervision, which requires more home visits, more office visits. And he was on that for a period of six months when he was first released.

Q In January, though, of 1995, did your relationship with Mr. Black change?

A Yes.

Q Describe for the Jury what happened in that time?

A In January of 1995 Mr. Black came into my office. He informed me at that time that he had a person staying with him off and on who was a parole fugitive and probation fugitive. He was a parole fugitive from the State of Oregon and probation fugitive from Salt Lake City. He was cashing forged checks at that time. He stated that this individual had shown him how he was doing it, and was cashing checks now in the Ogden area.

He was aware that Mr.--that the individual's name was Raymond Lindbrick, had done about ten checks here in the Ogden area. One of those checks he was able to obtain a brand new Toyota Corolla. Mr. Black gave me information where he was hanging out, the various drug houses he was going to to

purchase substances.

Based upon the information Mr. Black provided to me, I was able to do surveillance and find the individual. Followed his vehicle, pulled it over, and took him into custody. And confiscated evidence that led to convictions in the States of Washington, Oregon and Utah.

Q Did you receive any award for that?

A Yes, I did. I received a medal of merit provided by the Department of Corrections.

Q Now so the Jury knows, and some of them might know, you are a category 1 police officer?

A I am.

Q Parole and probation supervising officers in Utah are peace officers?

A The majority of them are.

Q Okay. And you were in that position, is that correct?

A Uh-huh. I finished the Police Academy in December of '94.

Q So much of what you do is basically police work?

A Correct.

Q In supervising these people.

A That's right.

Q All right. Now after January of 1995 when this information was given to you, did Adam Black continue to give

you information?

A He did. Mr. Black has a unique ability to talk to people and gain their trust. Over the next few months he would let me know--he would come and ask me if certain individuals were on the run, if they were fugitives from justice, and provided me information on various fugitives in the Ogden area.

Q Did that information turn out to be correct or incorrect insofar as you were able to check it?

A The majority of the time it was correct information. Usually--at that time they had started the NUCAT, the Northern Utah Criminal Apprehension Team.

Q You better tell the Jury what that is, just very quickly.

A It is run by the F.B.I. An enforcement agency made up of officers from the various agencies in the Weber-Davis County areas. And their main job is to chase fugitives that are on the run on probation and parole and failure to appear in court.

Q And was that information that he was giving you leading to the capture of people?

A Oh some occasions, yes. The other occasions it didn't materialize.

Q Did you ever find he wasn't telling the truth?

A No, I found his statements to be true.

ADDENDUM C

monitoring the bug and paying attention to Adam. That was specifically--that's what he was doing.

Q Okay. Now were you there when--did Lyle eventually get to that store?

A Yes, he did.

Q And did you see Lyle go in there?

A I did see Lyle go in.

Q Did you have any more to do with this case on that day?

A No.

Q And have you had any more to do with Adam Black as pertains to this defendant since that day?

A Well, with Adam, yes. I have dealt with Adam. I have also dealt with Ray up to the point he went back to the prison.

Q Okay. You didn't make any more buys from him after that insofar as you know?

A As far as I know, there was one additional buy, but the clarity there is, you know--

Q Did you continue to work Adam?

A Yes.

Q How many different casess?

A Numerous different cases.

Q How many different times did you go along like you have described on these two cases?

A Just about every one of them. I think I only missed two or three, maybe not even that many. I mean I was there on--I was one of the controlling officers through the whole thing.

Q And Adam did a lot of people?

A Yes, he did.

Q Is that fair?

A Yeah, he did. He did a lot of people. Not just in that one area, but he did numerous people in Ogden.

Q And many of them are now in prison?

A Yes.

MR. DAINES: Thank you, nothing further.

THE COURT: Cross.

MR. MILES: Thank you.

CROSS-EXAMINATION

BY MR. MILES:

Q Mr. Laplant, you indicated that through your fault, or whatever, no report was prepared, no notes were taken, that type of thing, is that correct?

A That's correct.

Q Why--tell me again why on something like this you don't--obviously it is numerous months since this occurred. wouldn't it be helpful to have a report or some notes to refer to?

A It would be very helpful.

ADDENDUM D

Ladies and Gentlemen of the Jury, I want to thank you in advance for the time and for your consideration in listening to the evidence here today. I am representing Mr. Perez, Raymond Perez, who we anticipate you will hear later on either today or tomorrow state what happened. He was there on occasions and he knows what happened.

You won't hear other witnesses. That we anticipate at this time, due to the fact that this was a situation where this Defendant knew Adam Black, he lived by the Red Duck where this took place, he would state that he was there a number of times. His apartment was up the hill from that. He is very familiar with Mr. Black and with other individuals around there. It was not surprising for him to be in that area. And you will hear him explain that.

We ar here today. It is the State's burden obviously, as the Judge indicated, to prove Mr. Perez is guilty beyond a reasonable doubt. It is not our job to prove him innocent. It is our job to make sure that the evidence that the State has is not just given to you and our version, or Mr. Perez' version of what happened is not left for you to wonder what happened. He is going to take the stand, and he is going to tell you, even though it is the State's burden to prove him guilty.

Initially, Ladies and Gentlemen, you will hear that Mr. Perez did meet this confidential informant--and frankly that

is where the case comes down to. Who do you want to believe. the confidential informant, who Mr. Daines from the State indicated has been in prison. He has been there on a burglary charge. And he is now out of prison. And he is passing this information along to the State.

Either he is telling the truth or Mr. Perez is telling the truth, that he did not do these things which the confidential informant is saying he did do those things. This is basically what this comes down to, Ladies and Gentlemen.

The information that you will hear from Mr. Perez, the testimony that he will give, is that he did live at 2560 Adams, apartment number 4. And that is critical when we get into the evidence. You will see that the reports made by the officers, the information given by the confidential informant is not consistent. There are discrepancies in the apartment number they go to. And I think you heard Mr. Daines indicate well maybe one report it said number 2, but he does live in number 4. Those are the issues that are going to be important here today. Mr. Perez does live at 2560 Adams, number four, which is right up the street from the Red Duck convenience store.

You will hear him indicate that he was in the convenience store a number of times. That he did know Adam from prison. Not very well. You will hear him indicate that he remembers him, knows who he was, but it wasn't like they had an

acquaintance where they would get together after. This was a situation that he recognized or knew Mr. Black, the confidential informant, when he went into the Red Duck. But he did spend a lot of time there going in and out.

But you will also hear that Mr. perez has never been involved in drug offenses, has never been convicted or charged with any drug offenses. And that he did not on these two occasions the State is indicating, did not in any way participate in selling drugs to the confidential informant.

Again, it is not our burden to prove that he did not sell these drugs. There may be some questions as to why the confidential informant would make the accusations against the Defendant, against Mr. Perez. The State in their testimony, and from what Mr. Daines has indicated in his opening, is that he just is doing this just basically to be a good guy. That he is the one that approached his parole officer and said, hey, I want to do some of this stuff.

Well, frankly the information that he has given, what he is getting in return is getting restitution paid off, is getting off parole, those type of things are things in return.

Now whether the State wants you to understand that he didn't anticipate getting any of these things or not, those are motives. Those are reasons why this confidential informant, who hasn't had an honest background, would have possibly to say and do these things, because of the

convenience that presented itself.

On the first occasion which they have charged, which is alleged to have occurred on October 30th, the information that we were given is this occurred at 2560 Porter number 2, apartment number 2. That is not where the Defendant lives. The Defendant lives at 2560 Adams apartment number 4. This is information coming directly from the confidential informant who supposedly went into this apartment.

Again, you won't hear testimony from anyone else other than the confidential informant that Mr. perez was in this apartment number 2. And he is the one that he got the drugs from. There is no other witnesses that are going to come and say, yes, I saw Mr. Perez there. He is the one that gave the drugs.

So again, it comes down to whether this confidential informant is actually telling the truth. The way these drug buys, as they call it go down, presents itself to having to trust a confidential informant in a situation like this. What if he was in there and was to get the drugs from someone else and come out and say he got them from Mr. Perez or another individual? That's what the agents and whoever is monitoring the situation goes by.

You will not hear a tape that is played that will have Mr. Perez' voice on it. That would be fairly easy to do if in fact this went down the way they said it did. If they are

monitoring it, and in fact presented him with a tape to record it, where is it? We could all decide for ourselves once Mr. Perez takes the stand if that is his voice. And you could make the decision based on that.

So again, we are left to Mr. Black, what he said is the way it went down. Well, that is not the way it went down. He is the only one who saw him supposedly on the first occasion. And he does not even give the correct information as to where Mr. Perez lives or the apartment number. Now whether he did this in apartment number 2, or other individuals were involved, I am not here to say. But it did not happen the way he said it happened.

On the second occasion again, which was some, oh, two weeks later, on November 13th, when you heard Mr. Daines explain the controlled buy supposedly at the Red Duck convenience store. Mr. Perez is not going to deny he was in the Red Duck. There is no question that he was there. He was there two or three times a week he indicated. So that may very well have happened that he was in there on the occasion that Mr. Bayless saw him in the store on the occasion.

But again we are left to Mr. Bayless leaving and the confidential informant dealing directly with Mr. Perez. And the situation going down the way that the confidential informant says it goes down.

Again, as they indicated, a tape was made. Well, there

is no tape. And maybe something happened to the tape. Maybe they didn't push the record button. I don't know what happened. But again we are left to listen to Mr. Black give his version of how it occurred at the Red Duck convenience store.

As he said, there was a number of people coming in and out all the time he was making buys left and right. Who knows, maybe some controlled, maybe some on his own. I don't know what--who the other individuals were that were in there.

But on the second offense as Mr. Daines even indicates before they could even speak with Mr. Perez--or excuse me, with the confidential informant about this supposed drug buy that went down with Mr. Perez, another individual came in and sold the confidential informant drugs. Because he turns over drugs to the Strike Force after this happened is not proof beyond a reasonable doubt that it was from--Mr. Perez whom he got these drugs from. So again we are left to listen to Mr.--to the confidential informant and trust what he says. And is he someone that we want to trust, and we want to believe beyond a reasonable doubt that this is the way it happened?

The testimony that we have, Ladies and Gentlemen, we don't have ten or twelve witnesses to put on the stand to back up anything that Mr. Perez says. Because frankly the way this happened, there would be nobody available, no one to do that. They are accusing him of doing something which he did not do.

He is not denying he goes in the Red Duck. He is not denying he lives in apartment number 4. So you will hear him testify he is not involved in selling the confidential informant drugs.

And based upon the inaccuracies and discrepancies in the way the reports were made, and the way the information was relayed from the confidential informant to the officers, that there are a number of inconsistencies that just don't jibe into having Mr. Perez be found guilty of these offenses.

And it is your job as Jurors to make that determination, to decide if it has been proven beyond a reasonable doubt based upon the testimony that you will hear.

Thank you.

THE COURT: All right, Members of the Jury, we are going to take a lunch recess at this point. We are going to reconvene at 1:30. Part of the reason we take that time is there is some other business that the Court has to take care of during the lunch hour.

I again need to admonish you not to discuss the case with anyone during the break. You are free to have lunch with one another. And you are not required to stay together as a Jury. You can go on your own way. If you eat lunch together or go with someone else, you are not to discuss among yourselves what you have heard from the attorneys in their opening statements.